

Oct 7 2005

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CLARENCE MADDOX  
CLERK U.S. DIST. CT.  
S.D. OF FLA. - MIAMI

CASE NO. 05-21918-CIV-LENARD/KLEIN

JAIME JALIFE,

Plaintiff,

vs.

ACE CAPITAL AND OTHERS UNDERWRITING  
AT LLOYD'S SEVERALLY SUBSCRIBING TO  
POLICY NO. A5BGLY170,

Defendants.

/

**DEFENDANTS' MOTION TO DISMISS, OR IN  
THE ALTERNATIVE, MOTION TO TRANSFER VENUE  
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants, ACE CAPITAL AND OTHERS UNDERWRITING AT LLOYD'S  
SEVERALLY SUBSCRIBING TO POLICY NO. A5BGLY170, (hereinafter  
"UNDERWRITERS"), by and through their undersigned counsel, request this Honorable Court  
to dismiss this case without prejudice pursuant to Federal Rules of Civil Procedure 12(b)(3) and  
12(b)(7), or in the alternative, to transfer this case to the United States District Court for the  
District of Delaware pursuant to 28 U.S.C. § 1404, which is where the Defendants first filed suit  
regarding the same contractual dispute presented in this case, and state:

**INTRODUCTION**

1. This case involves a marine insurance coverage dispute regarding the grounding of  
the *M/Y Mamma Mia* at Puerto Aventuras, Mexico on or about June 5, 2005. Defendants,

UNDERWRITERS, issued a marine insurance policy to Varadam Foundation, a non-party, and Plaintiff, JAIME JALIFE, to cover the Yacht during the period of May 20, 2005 to May 20, 2006. Mr. JALIFE owns Varadam Foundation, which is a Delaware corporation, and therefore he is the beneficial owner of the Yacht. The Policy contained a Navigation Warranty (or Limit) that required the Yacht to be north of the Tropic of Cancer between June 1<sup>st</sup> and October 31<sup>st</sup>. The Yacht grounded south of the Tropic of Cancer and violated the navigation warranty.

2. Defendants, UNDERWRITERS, first filed a declaratory judgment action against the Insureds, Varadam Foundation and JAIME JALIFE, in the Federal District Court for the District of Delaware on June 20, 2005. On July 15, 2005 Varadam Foundation filed an Answer to the Defendants, UNDERWRITERS', Complaint. The same day that Plaintiff, JAIME JALIFE'S, company, Varadam Foundation, filed an Answer in the Federal District Court in Delaware, JALIFE filed a declaratory judgment action for the very same dispute against the Defendants, UNDERWRITERS, in the United States District Court for the Southern District of Florida. Contrary to Local Rules 3.9C and D, Plaintiff, JAIME JALIFE, failed to advise this Honorable Court about the pendency of the Delaware suit. Plaintiff, JALIFE, also failed to advise this Court of the fact that his company had filed a Motion to Transfer Venue in the Delaware action.

3. ***On October 6, 2005, the United States District Court for the District of Delaware entered an Order denying Varadam Foundation's Motion to Transfer the first filed case to the United States District Court for the Southern District of Florida.*** Given the fact that the United States District Court for the District of Delaware refuses to relinquish its jurisdiction over the subject dispute, this Honorable Court is essentially compelled to either dismiss this action without prejudice, or in the alternative, to transfer this case to the Federal District Court in

Delaware

**STATEMENT OF MATERIAL FACTS**

4. Defendants, UNDERWRITERS, issued Policy of Insurance No. A5BGLY170 to Varadam Foundation and JAIME JALIFE, which provided hull and machinery and protection and indemnity coverage for their 2001 85' Azimut Motor Yacht named *Mama Mia* for the period of May 20, 2005 through May 20, 2006.

5. Varadam Foundation is a Delaware corporation with its principle place of business at 3511 Silverside Road, Suite 105, Wilmington, Delaware 19810. A copy of Varadam's Certificate of Incorporation dated January 30, 2001 and a copy of the Delaware Secretary of State's Division of Corporation Entity Details for Varadam are attached hereto and made a part hereof as Exhibits 1 and 2 respectively.

6. At all times material hereto, Varadam Foundation was and is the legal owner of the *M/Y Mamma Mia*. A Copy of the Yacht's Certificate of Registry is attached hereto and made a part hereof as Exhibit 3.

7. Varadam Foundation registered the *M/Y Mamma Mia* in St. Vincent and the Grenadines and the Yacht's Certificate of Registry shows that Varadam Foundation is the owner and is based in Wilmington, [Delaware], U.S.A. See Exhibit 3.

8. As the yacht owner and insured under the Policy, Varadam Foundation is an indispensable party concerning the resolution of the subject coverage dispute between the parties.

9. Varadam Foundation is not a party to the case at bar.

10. At all times material hereto, Plaintiff, JAIME JALIFE, was and is the sole or majority stock holder of Varadam Foundation and is the beneficial owner of the *Mamma Mia*.

11. At all times material hereto, Plaintiff, JAIME JALIFE, is a citizen of Mexico and conducts business in the State of Delaware.

12. Policy No. A5BGLY170 contained a Navigation Warranty that restricted the navigational limits of the *Mamma Mia* as follows:

Inland and coastal waters of the east and gulf coast USA between Eastport, Maine and Brownsville, Texas, including Bermuda, the Bahamas, and the Caribbean Sea, including Venezuela, but excluding Cuba, Columbia and Haiti. **Warranted not south of the Tropic of Cancer between 1<sup>st</sup> June and 31<sup>st</sup> October inclusive.**

13. On June 5, 2005, the *M/Y Mamma Mia* grounded at Puerto Aventuras, Mexico, which is south of the Tropic of Cancer.

14. On June 10, 2005, Defendants, UNDERWRITERS', sent a Reservation of Rights Letter to the Insureds, Varadam Foundation and JAIME JALIFE, which advised them that the UNDERWRITERS were reserving their rights to decline coverage for the grounding incident for violation of the Navigation Warranty and that they should take prudent steps to protect their interests under the circumstances. A copy of Defendants, UNDERWRITERS,' Reservation of Rights Letter dated June 10, 2005, is attached hereto and made a part hereof as Exhibit 4.

15. On June 20, 2005, Defendants, UNDERWRITERS, filed a Complaint for Declaratory Judgment regarding coverage under the Policy for the subject grounding incident in the United States District Court for the District of Delaware. A copy of the UNDERWRITERS' Complaint for Declaratory Judgment is attached hereto and made a part hereof as Exhibit 5.

16. On July 15, 2005, Varadam Foundation filed an Answer to the UNDERWRITERS' Complaint for Declaratory Judgment. A copy of Varadam Foundation's Answer is attached

hereto and made a part hereof as Exhibit 6.

17. On July 15, 2005, Plaintiff, JAIME JALIFE, filed a Complaint for Declaratory Relief against Defendant, UNDERWRITERS, in the United States District Court for the Southern District of Florida. Plaintiff, JALIFE, however, failed to advise the Honorable Court of the pendency of the first filed action in the United States District Court for the District of Delaware as required by Local Rule 3.9C and D.

18. On July 21, 2005, Plaintiff, JAIME JALIFE, filed an Amended Complaint for Declaratory Relief but again failed to advise the Court about the pendency of the first filed action in the United States District Court for the District of Delaware.

19. On July 20, 2005, Varadam Foundation filed a Motion to Transfer Venue with the United States District Court for the District of Delaware pursuant to 28 U.S.C. § 1404. Again, Plaintiff, JAIME JALIFE, did not advise this Honorable Court about his company's Motion to Transfer Venue that was filed with the United States District Court for the District of Delaware.

20. On October 6, 2005, the United States District Court for the District of Delaware entered an Order denying Varadam Foundation's Motion to Transfer Venue. Additionally, the United States District Court for the District of Delaware entered a Memorandum Opinion that thoroughly discussed the issues surrounding the first filed rule and held that the District Court in Delaware was going to retain jurisdiction of the case. A copy of the United States District Court for the District of Delaware's Memorandum Opinion and Order dated October 6, 2005, are attached hereto as Exhibits 7 and 8, respectively.

#### **MEMORANDUM OF LAW**

21. Defendants, UNDERWRITERS, base their Motion to Dismiss/Motion to Transfer

Venue on the “first-filed” rule. The “first-filed” rule holds that when parties have instituted competing or parallel litigation in separate federal courts, the court initially having jurisdiction should hear the case. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8<sup>th</sup> Cir. 1993); *Supreme International Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604 (S. D. Fla. 1997).

22. The “first-filed” rule is said to have originated with Chief Justice Marshall’s decision in *Smith v. M’Iver*, 22 U.S. 532 (1824). In *Smith v. M’Iver*, the Supreme Court said: “In all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it.”

23. It is now fundamental law that “in the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169 (11<sup>th</sup> Cir. 1982); *Supreme International Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604 (S. D. Fla. 1997).

24. Moreover, where two or more competing cases have been filed in different federal district courts, the federal court that has the first-filed case (i.e. “first-filed court”) is the appropriate forum in which to determine whether the first-filed case should proceed or whether it should be dismissed or transferred to a more appropriate forum. *Supreme International Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604 (S. D. Fla. 1997).

25. ***In the case at bar, the Federal District Court for the District of Delaware has already reviewed this matter and has determined that it will not transfer the case to the Federal District Court for the Southern District of Florida.*** See Exhibits 7 and 8. As a consequence, the Honorable Court is essentially required to dismiss this case without prejudice, or in the alternative, to transfer venue of this matter up to the District Court in Delaware. *Merrill*

*Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169 (11<sup>th</sup> Cir. 1982); *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8<sup>th</sup> Cir. 1993); *Supreme International Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604 (S. D. Fla. 1997).

26. In addition to the “first-filed” rule, the Court should dismiss this case because Plaintiff, JAIME JALIFE, has failed to name the yacht owner, Varadam Foundation, as a party to this suit, which party is obviously necessary for the just adjudication of this dispute. There is no question that Varadam Foundation is subject to personal jurisdiction before the Federal District Court in Delaware and therefore this Court should dismiss this action in favor of the Delaware action so that all of the interested parties are present in one suit and the UNDERWRITERS are not subject to liability for two separate judgments for the same alleged damages.

WHEREFORE, Defendants, ACE CAPITAL AND OTHERS UNDERWRITING AT LLOYD’S SEVERALLY SUBSCRIBING TO POLICY NO. A5BGLY170, request the Honorable Court to dismiss this case without prejudice pursuant to the “first-filed” rule and Federal Rules of Civil Procedure 12(b)(3) and 12(b)(7). In the alternative, Defendants request the Honorable Court to transfer venue of this case to the Federal District Court for the District of Delaware pursuant to 28 U.S.C. § 1404.

#### **CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that the foregoing has been electronically filed with this Honorable Court and that a true and correct copy of the foregoing has been furnished via telefax and U.S. Mail on this 7<sup>th</sup> day of October, 2005, to: Michael T. Moore, Esq., Moore & Co., P.A., Attorneys for JAIME JALIFE, 355 Alhambra Circle, Suite 1100, Coral Gables, Florida 33134; and Daniel K. Astin, Esq., The Bayard Firm, Attorneys for Varadam Foundation, 222 Delaware

Avenue, Suite 900, P.O. Box 25130, Wilmington, Delaware 19899.

STROUP & MARTIN, P.A.  
Attorneys for Defendants,  
ACE CAPITAL AND OTHERS  
UNDERWRITING AT LLOYDS, etc., et al.  
119 S.E. 12<sup>th</sup> Street (Davie Blvd.)  
Fort Lauderdale, FL 33316  
Phone: (954) 462-8808  
Fax: (954) 462-0278

By: Farris J. Martin, III /s/  
FARRIS J. MARTIN, III  
Florida Bar No. 0879916

**YACHT REGISTRY, LTD.**  
**CERTIFICATE OF INCORPORATION**  
**OF**  
**VARADAM FOUNDATION**

FIRST. The name of this Corporation is VARADAM FOUNDATION

SECOND. Its registered office in the State of Delaware is to be located at 3511 Silverside Road, Suite 105, County of New Castle. The Registered Agent in charge thereof is YACHT REGISTRY, LTD., 3511 Silverside Road, Suite 105, Wilmington, Delaware USA 19810.

THIRD. The purpose of this corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH. The amount of the total authorized capital stock of this corporation is \_\_\_\_\_  
                         Dollars (\$                     ) divided into 2 shares, of  
NO PAR VALUE                          Dollars (\$ NO PAR                     ) each.

FIFTH. The names and mailing addresses of each of the incorporator or incorporators are as follows:

NAME	MAILING ADDRESS
<u>YACHT REGISTRY, LTD.</u>	<u>3511 SILVERSIDER ROAD, SUITE 105</u> <u>WILMINGTON, DELAWARE 19810 USA</u>

SIXTH. Provisions for the management of the business and for the conduct of the affairs of this corporation and provisions creating, defining, limiting and regulating the powers of this corporation, the directors and the stockholders are as follows:

(1) The board of directors shall have the power to make, adopt, alter, amend and repeal the bylaws of this corporation without the assent or vote of the stockholders, including, without limitation, the power to fix, from time to time, the number of directors which shall constitute the whole board of directors of this corporation subject to the right of the stockholders to alter, amend and repeal the bylaws made by the board of directors.

(2) In addition to the powers and authority hereinbefore or by statute expressly conferred upon them, the board of directors of this corporation are hereby expressly empowered to exercise all such powers and to do all such acts and things as may be exercised or done by this corporation; subject, nevertheless, to the provisions of the statutes of the State of Delaware and of the Certificate of Incorporation as they may be amended, altered or changed from time to time and to any bylaws provided, however, that no bylaw so made shall invalidate any prior act of the board of directors which would have been valid if such bylaw had not been made.

SEVENTH: A director of this corporation shall have no personal liability to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that this provision shall not eliminate the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit.

I/WE, THE UNDERSIGNED, for the purposes of forming a Corporation under the laws of the State of Delaware, do make, file and record this Certificate, and do certify that the facts herein stated are true, and I/we have accordingly hereunto set my/our respective hand(s) and seal(s).

YACHT REGISTRY, LTD.

DATED JANUARY 30, 2001

BY: Lorelei A. Farrell  
LORELEI A. FARRELL (Assistant Secretary)

STATE OF DELAWARE  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
FILED 09:00 AM 01/30/2001  
010049047 - 3331354

[Frequently Asked Questions](#) [View Search Results](#) [Summary of Charges](#) [Logout](#)

## Entity Details

**File Number:** 3331354      **Incorporation Date / Formation Date:** 01/30/2001  
 (mm/dd/yyyy)  
**Entity Name:** VARADAM FOUNDATION  
**Entity Kind:** CORPORATION      **Entity Type:** GENERAL  
**Residency:** DOMESTIC      State: DE  
**Status:** GOOD STANDING

### TAX INFORMATION

**Last Annual Report Filed:** 2004  
**Annual Tax Assessment:** \$ 35.00      **Tax Due:** \$ 0.00  
**Tax Status:** CURRENT      **Total Authorized Shares:** 2

### REGISTERED AGENT INFORMATION

**Name:** YACHT REGISTRY, LTD.  
**Address:** 3511 SILVERSIDE ROAD SUITE 105  
**City:** WILMINGTON      **County:** NEW CASTLE  
**State:** DE      **Postal Code:** 19810  
**Phone:** (302)477-9800

### FILING HISTORY (Last 5 Filings)

<u>Seq</u>	<u>Document Code</u>	<u>Description</u>	<u>No. of pages</u>	<u>Filing Date</u> (mm/dd/yyyy)	<u>Filing Time</u>	<u>Effective Date</u> (mm/dd/yyyy)
1	0102S	Incorp Delaware Stock Co.	1	01/30/2001	09:00	01/30/2001

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To contact a Delaware Online Agent [click here](#).

Jun 09 05 03:53p

Milligan&amp;Sparrow

305 598 4992



**ST. VINCENT AND THE GRENADINES**  
**MARITIME ADMINISTRATION**

**Certificate of Registry**

Nr: 5378/Y

(Issued under the provisions of the Sections 6-36 of the Merchant Shipping Act, 1982)

WHEREAS, the Government of ST. VINCENT AND THE GRENADINES, has considered and approved the application of the ship described hereunder. THEREFORE, be it resolved, that there be issued, pursuant to the terms of the Merchant Shipping Act, 1982, this Certificate of registry to the said vessel entitling her to engage in foreign trade under the flag of St. Vincent and the Grenadines and be accorded the rights and privileges of a St. Vincent and the Grenadines vessel in accordance with the terms of the Merchant Shipping Act, 1982.

Name of Ship	Official Number	Cat. Sigr.	IMO Number
MAMMA MIA	5378	J8Y2009	N/A
Year & Port of Registry	Previous Name of Ship		Previous port of Registry
2001, KINGSTOWN	NEWBUILDING		N/A
Date	Name, Residence and Description of the Owner(s)	Shares	Recorded
10/05/2001	VARADAM FOUNDATION WILMINGTON, U.S.A.	100 %	23/08/2001

**PARTICULARS OF THE SHIP**

Where built	When built	Name and Address of Builders				
ITALY	2001	AZIMUT SPA, VIAREGGIO				
Type of Ship	Pleasure Yacht	Hull Material	Grp	Length	22.64 m	
Gross Tonnage	107	Number of Decks	1	Breadth	5.70 m	
Net Tonnage	32	Number of Masts	1	Moulded Depth	3.23 m	

**PARTICULARS OF THE ENGINES (IF ANY)**

Nr of sets	Description of engines	When Built	Number of Cylinders	Diameter	Length of stroke	KW
2	DIESEL	2000	12	130	150	1119

Name and address of makers

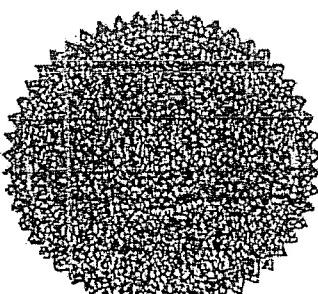
MTU - GERMANY

Classification Society NOT APPLICABLE

Issued by the authority of the Government of ST. VINCENT AND THE GRENADINES,  
under my hand and seal, at Monaco; this 11 January 2005.

This Certificate expires on 31 January 2006

The Commissioner for Maritime Affairs



06/09/05 THU 14:51 [TX/RX NO 5733] 002

**MAGINNIS & HURLEY**  
 ATTORNEYS & COUNSELORS AT LAW  
 A PROFESSIONAL LAW CORPORATION

MICHAEL J. MAGINNIS  
 TIMOTHY P. HURLEY  
 JOSÉ R. COT\*  
 SCOTT F. DAVIS  
 JULIE-ANN A. DUHÉ-KEATING\*

\*Also Admitted in Texas

CANAL PLACE ONE  
 365 CANAL STREET  
 SUITE 2750  
 NEW ORLEANS, LA 70130

TEL: 504/524-5353  
 FAX: 504/524-5403

m.maginnis@magninns.gs.net

June 10, 2005

*Via Certified Mail*

VARADAM FOUNDATION  
 3511 Silverside Road  
 Suite 105  
 Wilmington, DE 19818

*Via Telefax: 011-52-55-5311-0355  
 Ext. 272*

MR. JAIME JALIFE  
 Ahuehuetes  
 110 Casa 67  
 Mexico D.F. 11000

Re: Assureds: Varadam Foundation  
 and/or Mr. Jaime Jalife  
 Vessel: "MAMMA MIA"  
 (Registration No.: 5378)  
 Claim: Vessel grounded  
 at Puerto Aventuras, Mexico  
 D/L: June 5, 2005  
 Policy No.: A5BGLY170  
 Our File No.: 4640-60-5

**RESERVATION OF RIGHTS LETTER**

Dear Sirs:

This will serve to advise you that we have been retained by Certain Underwriters and Insurers at Lloyd's and in London, severally subscribing to Policy No. A5BGLY170 ("Underwriters"), providing hull and machinery and protection and indemnity insurance for Varadam Foundation and/or Mr. Jaime Jalife for the period May 20, 2005 to May 20, 2006, as per mutual agreement. The hull and machinery coverage provided by the aforementioned policy is pursuant to the American Yacht Form R12, subject to various conditions, warranties, endorsements and amendments as delineated in the policy.



**VARADAM FOUNDATION  
MR. JAIME JALIFE**

June 10, 2005

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**Reported Facts**

We understand that on or about June 5, 2005, at approximately 1455 hrs., as the vessel was attempting to enter Puerto Aventuras, Mexico, an engine failed, as a result of which the captain lost direction and control of the vessel, and the vessel grounded in a reef outside of the main entrance to the port. The incident was reported to Underwriters, through Alliance Marine Risk Managers, Inc., on June 6, 2005. We understand that the assureds contacted Titan Maritime, LLC to remove the vessel from the stranded location and reportedly entered into a time and materials agreement (Standard Form of Salvage Agreement (1997)) with Titan Maritime, LLC, not to exceed USD \$750,000.00. We further understand that the assureds also have an opportunity for a salvage sale of the vessel, "as is, where is" with a potential buyer, Bent Marine LLC.

**Policy Provisions**

The hull and machinery coverage in policy no. A5BGLY170 issued by Underwriters to Varadam Foundation and/or Jaime Jalife, is subject to all terms, conditions, warranties, endorsements, exclusions and definitions contained in the policy. Based on the facts and circumstances of this incident as reported to Underwriters, Underwriters hereby direct your attention to the following pertinent policy endorsement with regard to this claim, as follows:

It is hereby noted and agreed, effective inception, navigating limits hereon are amended to read as follows:

Inland and coastal waters of the east and Gulf Coast U.S.A. between Eastport, Maine and Brownsville, Texas, including Bermuda, the Bahamas and the Caribbean Sea, including Venezuela but excluding Cuba, Columbia and Haiti. Warranted not south of the Tropic of Cancer between 1st June and 31st October inclusive.

**VARADAM FOUNDATION****MR. JAIME JALIFE**

June 10, 2005

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Further noted and agreed, effective inception, the number of full-time paid crewmembers covered hereunder is increased from three (3) to four (4).

Therefore, in light of the aforementioned navigation warranty, please be advised that there may be no coverage for the referenced claim as a result of the assureds' apparent breach of this express warranty under the policy.

Notwithstanding this potential coverage defense, Underwriters will continue to investigate and evaluate this claim under a complete reservation of rights under the policy. Specifically, Underwriters reserve their rights, under the policy and the applicable law, to continue their investigation and evaluation of any obligation they may have under the policy, and to later supplement the basis herein set forth for reserving rights and/or denying coverage, if such action is warranted. Please note, however, that Underwriters' investigation and evaluation of this claim should not be construed as a waiver of any of their rights to invoke the terms, conditions, warranties and limitations of the policy, and that all actions taken by Underwriters are done entirely without prejudice.

In addition, Underwriters reserve their rights to withdraw from their handling of this claim and to cease payment of any aspect of this claim should it be determined that no coverage is owed under the policy. Moreover, Underwriters reserve their rights to seek reimbursement from the assureds of any and all expenses paid to, or on behalf of, the assureds by Underwriters with respect to the aforementioned incident in the event there is a determination of no coverage within the policy. Underwriters also reserve their rights to institute a declaratory judgment proceeding against the assureds in connection with the aforementioned coverage issues.

In light of the foregoing reservation of rights, Underwriters strongly urge you to take all appropriate actions to mitigate this loss, including exercising your rights under your agreement with Titan Maritime, LLC and to choose the best course of action available to you.

Underwriters would also recommend that you retain counsel and a qualified marine surveyor/consultant to advise you of your rights in connection

**VARADAM FOUNDATION**

**MR. JAIME JALIFE**

June 10, 2005

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with this incident and to assist you in pursuing appropriate action as a prudent owner under the circumstances.

Should you have any questions with regard to this letter, please do not hesitate to contact the undersigned at (504) 524-5353.

Thank you for your attention to this matter.

Very truly yours,

**MAGINNIS & HURLEY, APLC**

*Michael J. Maginnis*  
MICHAEL J. MAGINNIS



MJM:JRC:lm

cc: **ALLIANCE MARINE RISK MANAGERS, INC.**  
ATTENTION: **MR. VINCENT F. DEPAOLA**

**UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE**

ACE CAPITAL AND OTHERS	)	
UNDERWRITING AT LLOYD'S,	)	
SEVERALLY SUBSCRIBING TO	)	CIVIL ACTION NO. 05-
POLICY NO. A5BGLY170,	)	0 5 - 4 1 3
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
VARADAM FOUNDATION	)	
and	)	
JAMIE JALIFE,	)	
	)	
Defendants.	)	

2005 JUN 20 AM 10:09

U.S. DISTRICT COURT  
DISTRICT OF DELAWARE

**COMPLAINT FOR DECLARATORY JUDGMENT**

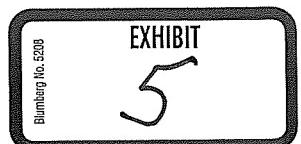
Plaintiffs, ACE Capital and others underwriting at Lloyd's, severally subscribing to Policy No. A5BGLY170, each for itself and not for another, claim against Defendants, Varadam Foundation and Jaime Jalife, and in support hereof allege as follows:

**PARTIES**

1. Plaintiffs are ACE Capital and others underwriting at Lloyd's, severally subscribing to Policy No. A5BGLY170, a policy of hull and machinery and protection and indemnity insurance for the M/Y MAMMA MIA, issued to Varadam Foundation and/or Jaime Jalife for the period May 20, 2005 to May 20, 2006, as per mutual agreement.

2. Defendant Varadam Foundation is a corporation organized under the laws of the State of Delaware and residing at 3511 Silverside Road, Suite 105, Wilmington, DE 19810. At

PBH: 176575.1



all material times, Varadam Foundation was and is the registered owner of the M/Y MAMMA MIA, was and is a named assured under the aforementioned policy of marine insurance, and is subject to the jurisdiction of the Honorable Court.

3. Defendant Jaime Jalife is a person of full age of majority and a citizen of Mexico, who resides in Ahuehuetes, 110 Casa 67, Mexico D.F. 11000. At all material times, Mr. Jalife was and is a named assured under the aforementioned policy of marine insurance, was and is doing business in the State of Delaware, and is subject to the jurisdiction of the Honorable Court.

#### **JURISDICTION AND VENUE**

4. The Honorable Court's jurisdiction is based upon the provisions of 28 U.S.C. § 1333. This is an action for a declaration of the rights and obligations of the parties pursuant to 28 U.S.C. § 2201 which, arising out of a policy of marine insurance that is a maritime contract subject to the general maritime law of the United States, constitutes a claim for relief within the admiralty and maritime jurisdiction of this Honorable Court under 28 U.S.C. § 1333 and within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. The Honorable Court's jurisdiction is also based upon the provisions of 28 U.S.C. § 1367(a) regarding supplemental jurisdiction.

5. Venue is properly laid in the District of Delaware pursuant to 28 U.S.C. § 1391(b), (c) and (d), and the general maritime law of the United States.

#### **CLAIM FOR DECLARATORY RELIEF**

6. There is a real and substantial and controversy between the parties concerning

their rights and obligations with respect to insurance coverage under the aforementioned policy of marine insurance.

7. Plaintiffs issued Defendants a policy providing hull and machinery and protection and indemnity insurance for the M/Y MAMMA MIA for the period May 20, 2005 to May 20, 2006, as per mutual agreement. The hull and machinery coverage provided by the aforementioned policy is pursuant to the American Yacht form R.12, subject to various conditions, warranties, endorsements and amendments as set forth in the policy.

8. The coverage afforded under the aforementioned policy is subject to, inter alia, an express promissory warranty which provides:

Inland and coastal waters of the east and Gulf Coast U.S.A. between Eastport, Maine and Brownsville, Texas, including Bermuda, the Bahamas and the Caribbean Sea, including Venezuela but excluding Cuba, Columbia and Haiti. Warranted not south of the Tropic of Cancer between 1st June and 31st October inclusive.

Further noted and agreed, effective inception, the number of full-time paid crewmembers covered hereunder increased from three (3) to four (4).

9. On June 6, 2005, Plaintiffs received notice by the assureds' agent, Alliance Marine Risk Managers, Inc., that the M/Y MAMMA MIA had grounded on a reef in the Gulf of Mexico off Puerto Aventuras, Mexico. At the time of the incident, the M/Y MAMMA MIA was south of the Tropic of Cancer and therefore outside the territorial limits specified in the aforementioned express promissory warranty.

10. On June 10, 2005, a reservation of rights letter was issued to the assureds on behalf of Plaintiffs.

11. A dispute has arisen between Plaintiffs and Defendants with respect to whether there is coverage under the aforementioned policy for the property damage sustained by the M/Y MAMMA MIA, and for the costs and expenses associated with removal of the vessel and other incidental damages, by reason of the grounding.

12. There is a justifiable controversy existing between Plaintiffs and Defendants which should be heard by this Honorable Court.

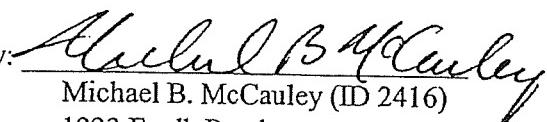
13. There may be other or further facts or circumstances which invalidate coverage under the aforementioned policy, or which violate the terms, conditions or warranties contained therein, and Plaintiffs therefore reserve the right to raise such other claims to amend the Complaint as may be necessary.

WHEREFORE, Plaintiffs respectfully demand judgment against Defendants declaring that there is no coverage afforded under the aforementioned policy with respect to this incident and for such other and further relief as the Honorable Court may deem just and proper, including the costs of this action.

Respectfully submitted,

PALMER BIEZUP & HENDERSON LLP

Date: June 17, 2005

By:   
 Michael B. McCauley (ID 2416)  
 1223 Foulk Road  
 Wilmington, DE 19803  
 (302) 594-0895  
 (302) 478-7625 (fax)  
 Attorneys for Plaintiffs

Of Counsel:

Michael J. Maginnis, T.A.  
(La. Bar No. 8862)  
José R. Cot  
(La. Bar No. 18852)  
Maginnis & Hurley, APLC  
365 Canal Street, Suite 2750  
New Orleans, LA 70130  
(504) 524-5353  
(504) 524-5403 (fax)

UNITED STATES DISTRICT COURT

District of Delaware

ACE CAPITAL et al.

**SUMMONS IN A CIVIL ACTION**

v.

VARADAM FOUNDATION and  
JAMIE JALIFE

CASE NUMBER: 05 - 413

TO: (Name and address of Defendant)

Jamie Jalife  
3511 Silverside Road  
Suite 105  
Wilmington, DE 19810

**YOU ARE HEREBY SUMMONED** and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Michael B. McCauley  
Palmer Biezup & Henderson LLP  
1223 Foulk Road  
Wilmington, DE 19803

an answer to the complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

JUN 20 2005

PETER T. DALLEO

CLERK

DATE

(By) DEPUTY CLERK

AO 440 (Rev. 8/01) Summons in a Civil Action

RETURN OF SERVICE		
Service of the Summons and complaint was made by me <sup>(1)</sup>	DATE	JUNE 20, 2005
NAME OF SERVER (PRINT) <b>DAVE CALABRO #722</b>	TITLE	
Check one box below to indicate appropriate method of service		
<input checked="" type="checkbox"/> Served personally upon the defendant. Place where served:	VARADAM FOUNDATION 351 SILVERSIDE ROAD SUITE 105 WILMINGTON, DE 19810	
<input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.	Name of person with whom the summons and complaint were left:	
<input type="checkbox"/> Returned unexecuted:		
<input checked="" type="checkbox"/> Other (specify): <u>Ms. B. Simmons, Secretary</u>		
STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL \$0.00
DECLARATION OF SERVER		
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.		
Executed on <u>June 20, 2005</u> Date	<u>Dave Calabro</u> Signature of Server	
<u>17th &amp; WASHINGTON STS, PHILA. PA</u> Address of Server		

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

JS 44 (Rev. 11/04)

05 - 413

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

ACE CAPITAL et al.

## DEFENDANTS

VARADAM FOUNDATION and JAMIE JALIFE

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Palmer Biezup & Henderson LLP  
1223 Foulk Road, Wilmington, DE 19803 (302) 478-0895

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- |  |  |
|--|--|
| <input type="checkbox"/> 1 U.S. Government Plaintiff | <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)   |

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                |                                |   |                                |                                |
|---|--------------------------------|--------------------------------|---|--------------------------------|--------------------------------|
| Citizen of This State                   | PTF <input type="checkbox"/> 1 | DEF <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | PTF <input type="checkbox"/> 0 | DEF <input type="checkbox"/> 4 |
| Citizen of Another State                | PTF <input type="checkbox"/> 2 | DEF <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | PTF <input type="checkbox"/> 5 | DEF <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | PTF <input type="checkbox"/> 3 | DEF <input type="checkbox"/> 3 | Foreign Nation  | PTF <input type="checkbox"/> 6 | DEF <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input checked="" type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Property Damage Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>REAL PROPERTY</b> <b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSIB Title XVI <input type="checkbox"/> 865 RSI (405(g))
			<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 890 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

## V. ORIGIN (Place an "X" in One Box Only)

- |   |   |  |   |  |   |  |
|---|---|--|---|--|---|--|
| <input checked="" type="checkbox"/> 1 Original Proceeding | <input type="checkbox"/> 2 Removed from State Court | <input type="checkbox"/> 3 Remanded from Appellate Court | <input type="checkbox"/> 4 Reinstated or Reopened | <input type="checkbox"/> 5 Transferred from another district (specify) _____ | <input type="checkbox"/> 6 Multidistrict Litigation | <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment |
|---|---|--|---|--|---|--|

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. 2201

Brief description of cause:  
Declaratory judgment as to coverage under policy of marine insurance

## VII. REQUESTED IN COMPLAINT:

 CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

06/17/2005

SIGNATURE OF ATTORNEY OF RECORD

*Michael B. McCauley*

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE**

**ACE CAPITAL AND OTHERS )  
UNDERWRITING AT LLOYD'S )  
SEVERALLY SUBSCRIBING TO)  
POLICY NO. A5BGLY170 )  
                            )  
Plaintiffs,             )  
                            )  
vs.                      )  
                            )  
**VARADAM FOUNDATION )  
and                      )  
JAIME JALIFE,          )  
                            )  
Defendants.            )  
\_\_\_\_\_****

**Case No. 1:05-cv-00413-SLR**

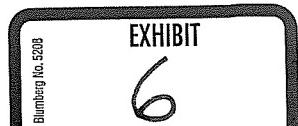
**ANSWER**

Comes Now, Varadam Foundation (hereinafter "Varadam"), by and through undersigned counsel<sup>1</sup>, to Answer Plaintiff's Complaint and states the following:

1. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 1 of the Complaint and therefore denies same and demands strict proof thereof.
2. Varadam admits the factual allegations contained in Paragraph 2 of the Complaint.
3. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 3 of the Complaint and therefore denies same and demands strict proof thereof.
4. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 4 of the Complaint and therefore denies same and demands

---

<sup>1</sup> Varadam's counsel will file its Motion to Appear Pro Hac Vice within the time frame allowed by the Federal Rules of Civil Procedure as well as the Local Rules for the District Court of Delaware.



strict proof thereof.

5. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 5 of the Complaint and therefore denies same and demands strict proof thereof.

6. Varadam admits the factual allegations contained in Paragraph 6 of the Complaint.

7. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 7 of the Complaint and therefore denies same and demands strict proof thereof.

8. Varadam denies the allegations contained in Paragraph 8 of the Complaint.

9. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 9 of the Complaint and therefore denies same and demands strict proof thereof.

10. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 10 of the Complaint and therefore denies same and demands strict proof thereof.

11. Varadam admits the factual allegations contained in Paragraph 11 of the Complaint.

12. Varadam is without knowledge or information sufficient to form a belief as to the truth of paragraph 12 of the Complaint and therefore denies same and demands strict proof thereof.

13. Varadam is without knowledge or information sufficient to form a belief

as to the truth of paragraph 13 of the Complaint and therefore denies same and demands strict proof thereof.

#### **Affirmative Defenses**

##### **FIRST AFFIRMATIVE DEFENSE**

As its first, separate and distinct affirmative defense, Varadam asserts that under the applicable insurance contract, it provisions and warranties Underwriters are obliged to cover the loss.

##### **SECOND AFFIRMATIVE DEFENSE**

As its second, separate and distinct affirmative defense, Varadam asserts that underwriters are equitably estopped from denying coverage of the loss.

##### **THIRD AFFIRMATIVE DEFENSE**

As its third, separate and distinct affirmative defense, Varadam asserts that underwriters are estopped under the doctrine of promissory estoppel from denying coverage under the loss.

##### **FOURTH AFFIRMATIVE DEFENSE**

As its fourth, separate and distinct affirmative defense, Varadam asserts that underwriters have failed to comply with certain provisions of the insurance contract, barring their ability to assert certain allegations in the Complaint.

##### **FIFTH AFFIRMATIVE DEFENSE**

As its fifth, separate and distinct affirmative defense, Varadam asserts that the warranties referenced in the Complaint by Underwriters were not in effect at the time of the loss.

##### **SIXTH AFFIRMATIVE DEFENSE**

As its sixth, separate and distinct affirmative defense, Varadam asserts that it was impossible to comply with certain warranties that are claimed to be in effect. Varadam does not waive its right to challenge whether the warranties, which were impossible to perform at the time of the loss, were in effect at the time of the loss.

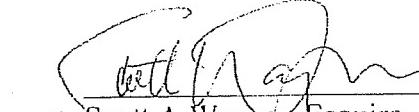
#### SEVENTH AFFIRMATIVE DEFENSE

As its seventh, separate and distinct affirmative defense, Varadam asserts that Underwriters are dealing in bad faith with the Defendant as Underwriters could not have conducted diligent investigation of the loss and made analysis of coverage before filing suit.

Dated: July 15, 2005

Respectfully submitted,

Moore & Co., P.A.  
Counsel for Varadam  
355 Alhambra Circle  
Suite 1100  
Coral Gables, Florida 33134  
Telephone: (786) 221-0600  
Facsimile: (786) 221-0601  
Email: swagner@moore-and-co.net



\_\_\_\_\_  
Scott A. Wagner, Esquire  
Florida Bar No. 10244  
Michael T. Moore, Esquire  
Florida Bar No. 207845

UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

ACE CAPITAL AND OTHERS )  
UNDERWRITING AT LLOYD'S )  
SEVERALLY SUBSCRIBING TO)  
POLICY NO. A5BGLY170 ) Case No. 1:05-cv-00413-SLR  
)  
Plaintiffs, )  
)  
vs. )  
)  
VARADAM FOUNDATION )  
and )  
JAIME JALIFE, )  
)  
Defendants. )  
\_\_\_\_\_  
)

AFFIDAVIT OF SERVICE

STATE OF FLORIDA )  
:SS  
COUNTY OF MIAMI-DADE )

BEFORE ME personally appeared the undersigned, Scott A. Wagner, who after  
been duly sworn, deposes and states as follows:

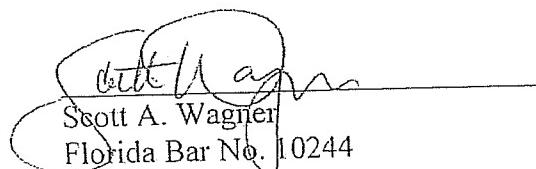
1. My name is Scott A. Wagner. I state that I am over 21-years of age and otherwise  
competent to make this Affidavit. The facts and circumstances set forth in this affidavit  
are true and correct and are based on my personal knowledge and the information  
available to me as an attorney at Moore & Company, P.A. My office is located at 355  
Alhambra Circle, Suite 1100, Miami, Florida 33134.

2. Pursuant to United States District Court for the District of Delaware Local Rule  
5.2(a), service of the foregoing document is made by overnight courier service, Federal

Express, to:

- a. Michael B. McCauley (ID 2416)  
Palmer Biezup & Henderson, LLP  
1223 Foulk Road  
Wilmington, DE 19803  
(302) 594-0895  
(302) 478-7625 (fax)  
Attorneys for Plaintiffs
  
- b. Michael J. Maginnis, T.A.  
(La. Bar No. 8862)  
Jose J. Cot  
(La. Bar No. 18852)  
Maginnis & Hurley, APLC  
365 Canal Street, Suite 2750  
New Orleans, LA 70130  
(504) 524-5353  
(504) 524-5403 (fax)

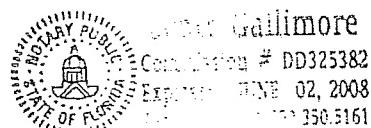
FURTHER AFFIANT SAYETH NOT.



Scott A. Wagner  
Florida Bar No. 10244

SWORN TO AND SUBSCRIBED before me this 15<sup>th</sup> day of July, 2005, by Scott

A. Wagner, who is personally known to me.



Scott A. Wagner  
NOTARY PUBLIC  
State of Florida

My Commission Expires:

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ACE CAPITAL AND OTHERS )  
UNDERWRITING AT LLOYD'S )  
SEVERALLY SUBSCRIBING TO )  
POLICY NO. A5BGLY170 )  
 )  
Plaintiffs, )  
 )  
v. ) Civ. No. 05-413-SLR  
 )  
VARADAM FOUNDATION and )  
JAIME JALIFE, )  
 )  
Defendants. )

---

Michael B. McCauley, Esquire, of Palmer Biezup & Henderson LLP,  
Wilmington, Delaware. Counsel for Plaintiffs.

Daniel K. Astin, Esquire, and Peter B. Ladig, Esquire, of The  
Bayard Firm, Wilmington, Delaware. Counsel for Defendants.

---

MEMORANDUM OPINION

Dated: October 6, 2005  
Wilmington, Delaware



*Jane L. Robinson*  
ROBINSON, Chief Judge

## I. INTRODUCTION

On June 20, 2005, Ace Capital "and others underwriting at Llyod's severally subscribing to Policy No. A5BGLY170" (collectively called "plaintiffs") filed a declaratory action against Varadam Foundation and Jaime Jalife (collectively called "defendants"). (D.I. 1) Plaintiffs issued marine insurance Policy No. A5BGLY170 (the "Policy") for the vessel MAMMA MIA. (D.I. 1 at ¶ 1) Defendant Varadam Foundation is a corporation organized under the laws of the State of Delaware. (D.I. 1 at ¶ 2) Defendant Jaime Jalife is a citizen of Mexico who does business in the State of Delaware. (D.I. 1 at ¶ 3) At all material times, defendant Jalife was the beneficial owner of the vessel MAMMA MIA and the named insured under the Policy. (D.I. 3 at 3) The court has jurisdiction under 28 U.S.C. § 1333 as the claim arises within the admiralty and maritime jurisdiction of the court. (D.I. 1 at ¶ 4) Before the court is defendants' motion to transfer venue to the United States District Court for the Southern District of Florida. (D.I. 3)

## II. BACKGROUND

The Policy was issued to provide protection and indemnity insurance for the hull and machinery of the vessel MAMMA MIA for the period May 20, 2005 to May 20, 2006. (D.I. 1 at ¶ 7) The coverage afforded under the Policy is subject to an express promissory warranty, which states: "Warranted not south of the

Tropic of Cancer between 1st June and 31st October inclusive."

(D.I. 1 at ¶ 8) On June 6, 2005, plaintiffs received notice that the vessel MAMMA MIA had grounded on a reef in the Gulf of Mexico, south of the Tropic of Cancer and, therefore, outside the territorial limits specified in the express promissory warranty.

(D.I. 1 at ¶ 9) A dispute has arisen between plaintiffs and defendants with respect to whether there is coverage under the policy for the property damage sustained by the vessel. (D.I. 1 at ¶ 11) Plaintiffs filed this declaratory judgment action seeking a declaration that there is no coverage afforded under the policy with respect to this incident. (D.I. 1) On July 15, 2005, twenty-five days after plaintiffs filed this action, defendant Jaime Jalife filed a complaint for declaratory relief against plaintiffs in the United States District Court for the Southern District of Florida seeking a declaration of coverage and alleging a breach of contract. (D.I. 6 at 3)

### **III. STANDARD OF REVIEW**

Defendants move the court to transfer this matter, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Southern District of Florida. Section 1404(a) provides: "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Because a plaintiff's choice of forum is

accorded substantial weight and venue is transferred only if the defendant truly is regional (as opposed to national) in character, a defendant has the burden of establishing that "the balance of convenience of the parties and witnesses strongly favors" the defendant. Bergman v. Brainin, 512 F. Supp. 972, 973 (D. Del. 1981) (citing Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970)). Therefore, defendants "must prove that litigating in Delaware would pose a 'unique or unusual burden' on their operations" for the court to transfer venue. Wesley-Jessen Corp. v. Pilkington Visioncare, Inc., 997 F. Supp. 556, 562 (D. Del. 1993).

In reviewing a motion to transfer venue, courts have not limited their consideration to the three enumerated factors in § 1404(a) (i.e., convenience of parties, convenience of witnesses, or interests of justice). Rather, courts have considered "all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (internal quotations and citation omitted). The Third Circuit has provided a list of factors to assist district courts in determining "whether, on balance, the litigation would more conveniently proceed and the interests of justice be better served by a transfer to a different forum." Id. These factors entail six

private and five public interests. Private interests include: (1) the plaintiffs' forum preference as manifested by the plaintiffs' original forum choice; (2) the defendant's forum preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses -- but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the location of the books and records. *Id.* Public interests include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; and (5) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.*

#### IV. DISCUSSION

As an initial matter, the parties argue over the implication of the Service of Suit clause in the policy. The Service of Suit clause states that "in the event of failure of the Underwriters . . . to pay any amount claimed to be due . . . the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America." (D.I. 3 at 6) Defendants argue that this clause

mandates that plaintiffs submit to the court to which the defendants wish to transfer. The court finds this argument unpersuasive.

According to the well-settled rules of contract construction, "the language of a contract is to be given its plain and ordinary meaning. Accordingly, where the provisions of a contract are plain and unambiguous, 'evidence outside the four corners of the document as to what was actually intended is generally inadmissible.'" Universal Studios, Inc. v. Viacom, Inc., 705 A.2d 579, 589 (Del. Ch. 1997) (quoting Weissman v. Sinorm Deli, Inc., 669 N.E.2d 242, 247 (N.Y.1996) (citation omitted)). Contract language "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning." City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1198 (Del. 1993). However, when construing an insurance policy, Delaware courts have formulated special rules of contract construction which differ from those applied to most other contracts. Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 926 (Del. 1982). If there is any ambiguity in the policy, it must be resolved in favor of the insured and against the insurer that drafted the policy. Aetna Cas. and Sur. Co. v. Kenner, 570 A.2d 1172, 1174 (Del. 1990).

The Third Circuit has held that when an insured sues an insurer, the Service of Suit clause acts to waive the defendant-

insurer's right to remove the case. Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1216-17 (3d Cir. 1991) However, when the issue is whether the same clause allows an insured to block, by a later filing in another court, the insurer's otherwise valid action for declaratory judgment, the same reasoning does not apply. See Int'l Ins. Co. v. McDermott Inc., 956 F.2d 93 (5th Cir. 1992) (holding a Service of Suit clause cannot block, by a subsequent filing in state court, the insurer's action for declaratory judgment in federal court). The language in the Service of Suit provision at bar is not ambiguous. Nothing in the Service of Suit clause prevents an insurer from bringing an action of its own against the insured.<sup>1</sup> If the insurer does so, the Service of Suit provision does not prescribe the forum for the action. "[T]he Service of Suit clause itself speaks only to actions brought by the insured. Thus, when the action is first instituted by the insurer, the Service of Suit clause simply has

---

<sup>1</sup>The policy continues to read, in relevant part:

Notwithstanding any provision elsewhere in this insurance relating to jurisdiction, it is agreed that the Underwriters have the right to commence an action in any court of competent jurisdiction in the United States of America, and nothing in this clause constitutes or should be understood to constitute a waiver of the Underwriter's right to remove an action to a United States Federal District Court to seek remand therefore or to seek a transfer of any suit to any other court of competent jurisdiction. . . .

no application." Int'l Ins., 956 F.2d at 95-96. It would be unreasonable to construe the Service of Suit provision to mean that an insured can block an insurer's valid declaratory judgment action by merely filing a subsequent lawsuit in another jurisdiction.<sup>2</sup> See International Insurance, 956 F.2d at 96 (concluding that such an interpretation would "make the Service of Suit clause a convenient mechanism by which the insured could deprive the insurer of its right to seek a declaratory judgment or other redress from the courts.").

The Service of Suit provision does not demand that plaintiffs agree to the motion to transfer by defendants. Furthermore, defendants' motion to transfer is denied because it is not clear that the suit could have been brought initially in the Southern District of Florida and, on a balance, the court finds that the public and private interest factors favor maintaining venue in the District of Delaware. As plaintiffs point out in their opposition to the motion to transfer, defendants never clearly show that the suit could have been brought in the Southern District of Florida. While the defendants state that "Plaintiff and Defendant do business within

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<sup>2</sup>The Fifth Circuit concluded that the Service of Suit clause must be construed to allow the insured to choose which forum will hear its action and to allow the insurer to choose which forum will hear its action, even though, in some cases, this may lead to "an unfortunate race to the courthouse." International Insurance, 956 F.2d at 96 (emphasis in original).

the Southern District of Florida," the defendants only specifically state that Jaimie Jalife personally conducts business in Florida. (D.I. 3 at 3) There is no clear showing that Varadam would have been subject to a suit in Florida and, therefore, the motion to transfer is denied.<sup>3</sup> See Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970).

In further support, the balance of the private and public factors weigh in favor of not transferring the action.

Defendants assert that the Southern District of Florida is best suited for the convenience of the parties and witnesses. The court, however, has denied motions to transfer venue when the movants were unable to identify documents and witnesses that were unavailable for trial in Delaware. See, e.g., Argos v. Orthotec LLC, 304 F. Supp.2d 591 (D. Del. 2004). This case will primarily involve executed documents and applicable law. At this point there is no reason to believe that a large number of witnesses will be required. Defendants have not specifically indicated any witnesses who would be unable or unwilling to appear in Delaware, nor any documents that would be too burdensome to ship to Delaware. Therefore, defendants have not shown litigation in Delaware presents an unusual burden.

Both defendant Varadam, by incorporating in Delaware, and

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<sup>3</sup>In fact, defendant Varadam is not a party to the suit filed by Jaime Jalife in the Southern District of Florida.

defendant Jalife, by conducting business in Delaware, have availed themselves of the laws of this State. As such, mere inconvenience is not a sufficient justification to set aside plaintiffs' choice of forum and transfer venue to the Southern District of Florida.

There is no evidence that the case should be transferred due to public interests. The court does not find defendants' proposition regarding the greater availability of Spanish speaking interpreters in Florida to be persuasive. In addition, Delaware has an interest in litigation regarding companies incorporated within its jurisdiction. Finally, while defendants may find it difficult and against the interests of justice to have two courts decide two sister cases, this situation is a direct result of defendants' actions.

#### **V. CONCLUSION**

For the reasons discussed above, defendants' motion to transfer venue is denied. An order consistent with this memorandum shall issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ACE CAPITAL AND OTHERS )  
UNDERWRITING AT LLOYD'S )  
SEVERALLY SUBSCRIBING TO )  
POLICY NO. A5BGLY170 )  
 )  
Plaintiffs, )  
 )  
v. ) Civ. No. 05-413-SLR  
 )  
VARADAM FOUNDATION and )  
JAIME JALIFE, )  
 )  
Defendants. )

O R D E R

At Wilmington this 6th day of October, 2005, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that defendants' motion to transfer venue (D.I. 3) is denied.

Mark L. Robinson  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21918-CIV-LENARD/KLEIN

JAIME JALIFE,

Plaintiff,

vs.

ACE CAPITAL AND OTHERS UNDERWRITING  
AT LLOYD'S SEVERALLY SUBSCRIBING TO  
POLICY NO. A5BGLY170

Defendants.

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE**

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THIS MATTER is before this Honorable Court upon the Defendants' Motion to Dismiss or Change Venue, and the Court having considered said Motion, and having reviewed the Court file and being otherwise duly advised in the premises, it is

**ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss is hereby  
**GRANTED** without prejudice, and it is further

**ORDERED AND ADJUDGED** that Plaintiff, JAIME JALIFE, may file a Counterclaim in the action currently pending before the United States District Court for the District of Delaware.

**DONE AND ORDERED** in Chambers at Miami, Dade County, Florida this \_\_\_\_\_ day of October, 2005.

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HONORABLE JOAN A. LENARD  
U.S. District Court Judge

Copies Furnished:

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